Supreme Court, U.S.
FILED

No. 00-236 AUG 11 2000

OFFICE OF THE CLERK

In The

Supreme Court of the United States

GEORGE BLAIR & CONNIE BLAIR, a/k/a CONNIE MAIKOWSKI,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

MILTON R. HENRY – P 14884
Counsel of Record
2560 Vhay Lane
Bloomfield Hills, Michigan 48304
PHONE: (248) 646-3103
FAX: (248) 642-3054
E-MAIL: MiltonHen@Prodigy.net
Attorney for the Petitioners, George and Connie Blair

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

61FP

QUESTIONS PRESENTED FOR REVIEW

A. Whether the convictions of both appellants in the District Court for the Eastern District of Michigan should be vacated and set aside where, in clear disregard of the guarantees of the Fifth Amendment to the U.S. Constitution, and §§ 1861 and 1862 of Title 28 U.S.C., the indictments returned against both appellants, the Blairs, were returned by grand juries that, in each case, as acknowledged by two of the Opinions of the Court of Appeals for the Sixth Circuit, to wit: *United States v. Ovalle*, 163 F.3d 1092 (6th Cir. 1998) and *United States v. Spearman*, 186 F.3d 743, 747-66 (6th Cir. 1999) did not represent a fair cross section of the community in the Eastern District of Michigan.

And, tied to that very important question is whether ***any conviction*** can be allowed to stand, consistent with Constitutional Due Process of Law, once it has been brought to the attention of an Appeals Court, that an indictment upon which an accused was brought to trial had actually been returned by a Grand Jury that was selected in clear violation of the provisions of Title 28 U.S.C. §§ 1861 and 1862.

B. Whether because of the clear language of the Fourth Amendment to the U.S. Constitution, that "No warrants shall issue, but upon probable cause, . . . and particularly describing the place to be searched, and the persons or ***things to be seized***," along with Article 1, § 11 of the Michigan Constitution of 1963, which provides that "No warrant shall issue to . . . seize any . . . things . . . ***without describing them***." The search of the Blair residence conducted in the within case became a prohibited "General Search" where the searching officers,

QUESTIONS PRESENTED FOR REVIEW – Continued

under mandates authorizing only the seizure of "IRS Documents" (Federal Warrant) and "items related to narcotics transactions" (State Warrant), seized jewelry, money, motor vehicles, computers and every single document found on the premises being searched.

C. Whether the "Plain View" Doctrine, as set forth in *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987), and *People v. Champion*, 549 N.W. 2d 849, 452 Mich. 92 (1996), required the Appeals Court below, once it had before it the sworn testimony of the seizing officer, from the witness stand, that he seized the suspect vial and made his field test on its contents, not having any idea what it contained, but to find out whether it contained contraband, to hold, as a matter of law, that all of the evidence procured under the State Warrant issued on the basis of that field test, had to be suppressed, and the appellants discharged from further custody.

D. Finally, this appeal involves a review of the Question of whether anything said in *United States v. Singleton*, 163 F.3d 1297 (10th Cir. Jan. 8, 1999), *cert. den.*, June 21, 1999, No. 98-8758, 119 S.Ct. 2371, or in *United States v. Ware*, 161 F.3d 414 (6th Cir. 1999), could make lawful the **police officers** (not prosecuting attorneys) in this case paying prospective witnesses money, and giving them other things of value in exchange for their testimony against the petitioners.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Authorities iv

Opinion Below 2

Jurisdiction 3

Constitutional Provisions and Statutes Involved in this Case 3

Concise Statement of Relevant Facts in the Case ... 5

Reasons for Granting the Writ 10

Conclusion 16

Appendix Following Consisting of

1. The Opinion Below A-1
2. The Judgment of the Court of Appeals A-35
3. The Testimony of Sgt. James Raby A-36

TABLE OF AUTHORITIES

Page

CASES

Andresen v. Maryland, 427 U.S. 463 (1976) 1

Arizona v. Hicks, 480 U.S. 321 (1987) 1

Cassell v. Texas, 339 U.S. 282 (1950) 14

Dunn v. Simmons, 877 F.2d 1275 (6th Cir. 1989), *cert. den.*, 494 U.S. 1061 (1990) 12

Marron v. United States, 272 U.S. 192 (1927) 1

Parke v. Raley, 945 F.2d 137 (6th Cir. 1991), 506 U.S. 20 (1992) 12

People v. Champion, 452 Mich. 92, 549 N.W. 2d 849 (1996) 1

Powers v. Ohio, 499 U.S. 400 (1991) 14

United States v. Marktray Spearman, 186 F.3d 743 (6th Cir. 1999) 13

United States v. Ovalle, 136 F.3d 1092 (6th Cir. 1998) ...1, 8

United States v. Singleton, 165 F.3d 1297 (10th Cir. 1999) (en banc) 2, 9

Vasquez v. Hillery, 474 U.S. 254 (1986) 14

CONSTITUTIONAL PROVISIONS

Amendment IV 3

Amendment V 3, 8, 9, 12

Amendment VI 4, 6, 7, 10, 12, 13

STATUTES

Title 18 U.S.C. § 201(c)(2) 2, 5, 15

Title 28 U.S.C. § 1861 ..... 1, 4, 13

Title 28 U.S.C. § 1862 ..... 1, 4, 13

PETITION FOR A WRIT OF CERTIORARI

George Blair and Connie Blair respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered on May 26, 2000, to correct that decision, with respect to the applicable law regarding the "General Search", and its application, as well as "The Plain View" exception to the warrant requirement; and the Petitioners pray for allowance of a Writ of Certiorari, to remedy the wrongs caused them personally, and the people at large, by a decision of an inferior appeals court, that water down and render nugatory the clear holdings of the U.S. Supreme Court in *Marron v. United States*, 272 U.S. 192 (1927); *Arizona v. Hicks*, 480 U.S. 321 (1987); *Andresen v. Maryland*, 427 U.S. 463, 480 (1976); and of the Michigan Supreme Court in the case of *People v. Champion*, 452 Mich. 92, 549 N.W. 2d 849 (1996).

The Petitioners, George and Connie Blair, also pray for the issuance of a Writ of Certiorari to review the denial to George Blair's of the vacation of his conviction, where his motion was filed shortly after the Sixth Circuit's announcement of its decision in *United States v. Ovalle*, 136 F.3d 1092 (6th Cir. 1998), and prior to his sentencing; and where Connie Blair, prior to her trial, challenged the validity of her indictment by a panel which under *Ovalle* clearly did not pass muster within the requirements of Title 28 U.S.C. §§ 1861 and 1862. As to both Blairs, the petition is sought to make clear that once the invalidity of a Grand Jury Indictment is known by the Courts, and the defendants challenge the proceedings on that ground, such challenges cannot go unanswered, for it is the fundamental duty of the sovereign to make sure that justice be done

in every case; and a failure to remedy an obvious wrong, on some gratuitous technicality, would be such a departure from the accepted and usual course of American Jurisprudence as to render this a government of whim and perversity, and caprice, and not of law.

Finally, the Petitioners claim that Title 18 U.S.C. § 201(c)(2), which prohibits anyone from directly or indirectly giving money to prospective witnesses as an incentive for their testimony on an upcoming trial, operates to prevent police officers, as distinguished from prosecuting attorneys, from paying witnesses for their testimony, and especially where the Court has no knowledge of, nor authorizes, such payments; and to the extent that the case of *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999) (en banc), is a divided opinion, with five Justices, including the chief Justice disagreeing on the scope of the word "whoever", and none of the judges of that entire court dealing with the question of whether § 201(c)(2) bars **police officers** from unilaterally paying witnesses for their testimony. Review of this very serious question, the answer to which affects the outcome of the within appeal, and thousands of others throughout these United States, should be granted via Certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit that gives rise to this petition is reprinted in the Appendix hereof, beginning at page A-1, and concluding at Page A-34.

JURISDICTION

On May 26, 2000, the Sixth Circuit Court of Appeals decided and filed its Opinion and Judgment in the consolidated George and Connie Blair Appeals (see appendix, page A-35). Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the Judgment entered by the Court of Appeals.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and ***particularly describing the place to be searched, and the persons or things to be seized.***

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; ***to be confronted with the witnesses against him;*** to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Title 28 U.S.C., Sec. 1861. Declaration of policy

It is the policy of the United States that all litigants in Federal courts ***entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.*** It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

Title 28 U.S.C., Sec. 1862. Discrimination prohibited

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.

Title 18 U.S.C., Sec. 201(c)(2):

(c) Whoever –

> (2) directly or indirectly, ***gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court,*** any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom.

CONCISE STATEMENT OF RELEVANT FACTS IN THE CASE

The Petitioners, George and Connie Blair, who are husband and wife, are presently confined in the Federal Prison system serving prison terms respectively of 262 and 168 months.

Petitioners were originally brought to trial on multi-count indictments charging them with possessing with intent to distribute controlled substances of various quantities, and with the operation of a continuing criminal enterprise; and in Connie Blair's case, with one count of money laundering.

George was found guilty after a non-Jury Trial of five counts of Possession of Crack Cocaine, and was acquitted of operating a continuing enterprise. Connie, whose trial followed George's because of illness, entered a plea of

nolo contendere to One Count of Possession of a Controlled Substance, and to One Count of Money Laundering, with the understanding that she would be allowed to contest the trial judge's rulings on George's suppression motion which sought to invalidate the search of her and George's home, and that she would retain her right to appeal the motions filed to quash the indictment filed against her.

The Motion to Suppress the evidence taken from the appellants' home on Third St., in Detroit, was central to the appellants' conviction, and without the physical drug evidence seized from that home, the convictions of neither party-defendant could stand.

Appeals for both of the Blairs were consolidated at the Appeals Court level, and the Judgment of the Court of Appeals was also rendered in a single opinion, as to both defendants.

At the very heart of this appeal is a clear violation by the Court of Appeals of the Sixth Amendment rights of the Appellants, insofar as the Court of Appeals based its "Plain View" decision entirely upon matters set forth in a sterile affidavit for the State Search Warrant pursuant to which the Search was actually had, signed by Sgt. James Raby, rather than upon the sworn testimony of the said James Raby, which indicated that at the time the Sgt. seized and field tested the contents of a small 1¾" vial, there was no other item in sight upon which he could form any belief, probable or otherwise, that the vial contained narcotics; and his specific testimony which the Court had before it in Vol. 1, of the trial transcripts, on pages A-38 and A-39 (see appendix hereto), made clear

that Sgt. Raby had no inkling of the nature of the white powder seen in this small vial, and made his test to discover its nature. The Court of Appeals had before it the transcripts of the testimony of Sgt. Raby; but unlawfully based its opinion as to the existence of a "Plain View" Search, upon matters drawn from Sgt. Raby's affidavit for a State Search Warrant, in total disregard of the Sixth Amendment to the U.S. Constitution, which clearly limits trial decisions to the testimony under oath of the witnesses who are sworn before the defendant, and are subject to his cross-examination. And decisions in criminal trials cannot, under the Sixth Amendment, be based upon pre-trial affidavits, which conflict with the sworn testimony adduced upon trial.

The claim of the Blairs with respect to the search of their home, and seizure of every moveable thing of value, including ***all of the documents*** found on the premises, their computer, printer, money, jewelry, and other valuables, motor vehicles, a business truck and motor home, without any process authorizing such seizures, and without any forfeiture proceedings having followed the taking of these things, converted the search into a "General Search", which, if the decisions of the Supreme Court had been followed by the courts below, would have mandated the suppression of all of the evidence taken, and with that suppression, the overturning of the Petitioners' convictions.

On top of the "general" nature of the search, and related to the Sixth Amendment violation referred to hereinabove, there is involved the clear error of the Court of Appeals in finding that a seizure of a small plastic baggie from a 1¾ by 3" vial, and the testing of those

contents, constituted a "Plain View" search, where the sworn testimony of the officer who seized the baggie and made the field test, was that before he did so, ***he had absolutely no basis for knowing what the vial contained,*** along with his clear testimony ***that nothing in the area gave rise to any suspicion of drugs being present in the surrounding areas.*** Yet, the appeals court, in disregarding this clear testimony at trial of Officer Raby, and selectively using averments from Sgt. Raby's affidavit for a State Warrant, committed a fundamentally egregious error, and violated the defendants' inalienable right to both Due Process under the Fifth Amendment, as well as their right, on their trial, to confront, to cross-examine, and to have only the sworn evidence of those witnesses called on trial, used against them.

In addition to the Constitutional Search Questions above, because the Sixth Circuit had stated in their decision in *United States v. Ovalle*. that the Grand Jury which returned the *Ovalle* indictments had been assembled in violation of the Federal Jury Selection and Service Act, and that all indictments issued by the Grand Jury in the Eastern District of Michigan were invalid, the defendants filed motions for dismissal of their cases. Their motions preceded the sentencing of George Blair, and the trial of Connie Blair. Connie Blair's motion was premised upon the fact that her indictment was also void, because of the fact that the defects pointed out in the *Ovalle* case still persisted at the time her so-called superseding indictment had been filed.

The District Judge dismissed her indictment, but held that George's Motion to Dismiss his indictment had not been timely filed, and could not be entertained, even in

the face of knowledge that the defect attaching to the entire Eastern District of Michigan Jury pool had not been corrected. There being no dispute as to the defective nature of George's indictment, the question is whether, knowing the indictment was infirm, any valid sentencing of George could then be had considering both the Due Process Clause of the Fifth Amendment, as well as the fact that that same Amendment states that "No person shall be held to answer for an infamous crime, except on a valid indictment of a Grand Jury."

This case then involves the basic question: Can a court, knowing a defendant stands before it on an invalid indictment, consistent with the requirements of the Fifth Amendment, be sentenced to what amounts in George's case, to a term of life imprisonment?

The final issue involved in the within appeal relates to the propriety of State Narcotics officers paying each of the witnesses who appeared against George Blair for their testimony. Their motion was premised in the first instance upon what was said in the original Tenth Circuit Case of *United States v. Singleton*. That case however, was heard by an en banc panel of that Court at 165 F.3d 1297, which never reached the issue of whether narcotics police officers could pay for witnesses' testimony. However, that opinion contains a well-reasoned dissent by three of the Court's Justices, which makes fairly clear that while the ***sovereign*** might be insulated from the "whoever" with which the Act begins its prohibitions, nothing in the Act, or the opinion of Court, refers to ***policemen,*** engaged in the "competitive enterprise" of seeking drug convictions.

REASONS FOR GRANTING THE WRIT

The issue of the limitations placed upon Appeals, and other Federal Courts, with respect to what evidence can be relied upon to support their decisions, is at the heart of this Petition for Certiorari.

When the Sixth Amendment states that "In all criminal prosecution, the accused shall enjoy the right to a public trial, . . . to be confronted with the witnesses against him," that language places a priority upon the ***testimony*** given by ***the witnesses who are produced on trial, placed under oath, and subjected to cross-examination.***

In this case, however, the Court of Appeals in reaching its decision on the "Plain View" search question, totally disregarded ***the sworn testimony*** of officer Raby, ***given on trial of the defendant,*** and determined that a field test of evidence by a Detroit Vice Sergeant, who admitted in his trial testimony that he had no inkling what the suspected substance in a small vial was when he made his field test, could be totally disregarded in favor of allegations appearing in a pre-trial search warrant application made to a Detroit Magistrate. The error of the Court of Appeals clearly appears from its own opinion. (See Page A-12, appendix of this petition.)

> Here, the District Court relied on Raby's statement in his affidavit in support of the state search warrant to determine that the drugs were in plain view. Raby testified that while searching the master bedroom on the federal warrant, he:

> observed in a (sic) open pill vial, a clear plastic bag containing a hard off white substance that the affiant believed to be cocaine. The affiant conducted a field test on the substance which tested positive for the presence of cocaine. Further, the affiant observed numerous bundles several inches each containing one hundred dollar, fifty and twenty dollar bills. Further, the affiant observed boxes of syringes lying on the bed in the master bedroom.

Sgt. Raby never ***testified*** to the above facts. His ***testimony***, set forth in the appendix to this Petition for Certiorari, was that ***"when he returned to the scene," after*** procuring the State Search Warrant "he entered the premises and observed various items that had been confiscated; and he observed money being removed from the dresser drawer, the master bedroom."

But, more to the point, Sgt. Raby testified, on the stand A-39 of the appendix hereto, that ***before he field tested the vial's contents***, he saw no items that seemed drug related, and further, and most importantly, that "he wanted to check the powder out ***to find out if it was heroin.***"

Neither the trial court, nor the reviewing Court of Appeals, has any right to base a legal decision in a criminal case, upon clear distortions, and additions of its own. In this case the language of the Court of Appeals cited above, has no relationship whatever to the clear and unambiguous testimony adduced on the defendant's trial; and the act of the lower courts, in basing their decision on extra-record matters critical to the outcome of

the litigation, becomes a clear violation of the Fifth and Sixth Amendments to the Constitution.

In *Parke v. Raley*, 945 F.2d 137 (6th Cir. 1991), 506 U.S. 20 (1992), the Sixth Circuit was commended by the Supreme Court for stating in its earlier decision of *Dunn v. Simmons*, 877 F.2d 1275 (6th Cir. 1989), *cert. den.*, 494 U.S. 1061 (1990) that: "when the prosecution seeks to demonstrate the regularity of a prior proceeding with ***extra record evidence***, that evidence must be 'clear and convincing' . . . " and that there is a "heightened standard regarding the importance of the constitutional rights at stake and the government's position relative to the defendant."

Those statements clearly show that the Court of Appeals in this case flagrantly and deliberately disregarded its own prior holdings that testimony given under oath, and subject to cross-examination, cannot be impugned, because of the Sixth Amendment, and Fifth Amendment considerations of Due Process, by extra-record evidence, which is contradicted by the proponent upon the trial. The decisions cited above also make clear that the Sixth Amendment, and Fifth Amendment Due Process bar both trial and appellate courts from finding facts based upon extra-record evidence, which is totally disavowed by the maker upon trial.

For the foregoing reasons alone, where the fate of thousands of "The Least of These" is at stake, the Petitioner's Petition for Certiorari should be Granted.

Tied to this search issue is the review of what is clearly a Prohibited General Search; and what has been said hereinabove on page 7 of the Petitioners' "Concise Statement of Relevant Facts in the Case" is included here,

by reference, as one of the many grounds for granting the Petitioners' Petition for a Grant of a Writ of Certiorari.

SECOND

Where the Court of Appeals was cognizant of the fact that the July Selection Plan for the Eastern District of Michigan, which returned the indictments against the Blairs, was violative of the Jury Selection and Service Act, 28 U.S.C. §§ 1861 and 1862, supra, their convictions must be vacated and set aside, as a matter of due process.

Petitioners adopt all of the arguments that are set forth in the Dissent of the Hon. Eric Clay, Justice, on pages A-22 – A-34 of the attached appendix, as well as those set forth in *United States v. Marktray Spearman*, 186 F.3d 743 (6th Cir. 1999), as further reason why Certiorari should be allowed in this case.

The Sixth Amendment provides, without any exceptions that every accused in criminal prosecutions shall ***enjoy*** the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; while 28 U.S.C. § 1861, says that in every Federal Court the accused shall have a right to grand and petit juries selected at random from a fair cross section of the community in the district wherein the court resides.

Every accused, whether white, black, or green, is entitled to a jury drawn at random from a fair cross section of the Community. The Grand Jury in the Eastern District of Michigan was admittedly not so drawn. Compliance with the statutory provision does not hinge on

race alone; but rather it seeks to insure that whatever race one might be, he will go before a jury that was drawn from a list representing ***a fair cross section of the community***. In this case it so happens that ***Connie Blair is white***, while George is black. So, if the claim be made that the panel is presently weighted to favor black folk, then it surely cannot be held to favor Connie Blair, who happens to be white. So, the second indictment, as to her, returned by a panel which was admittedly tailored to increase Latino and Black representatives on the jury roll, could not validate her indictment by a grand jury so chosen. *Cf. Powers v. Ohio,* 499 U.S. 400 (1991) where we read:

> **Both the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom.** A venire person excluded from jury service because of race suffers a profound personal humiliation heightened [p. 414] by its public character. The rejected juror may lose confidence in the court and its verdicts, as may the defendant if his or her objections cannot be heard. This congruence of interests makes it necessary and appropriate for the defendant to raise the rights of the juror. And there can be no doubt that Petitioner will be a motivated, effective advocate for the excluded venire persons' rights. **Petitioner has much at stake in proving that his jury was improperly constituted due to an equal protection violation, for we have recognized that discrimination in the jury selection process may lead to the reversal of a conviction.** *See Batson, supra,* 476 U.S. at 100; *Vasquez v. Hillery,* 474 U.S. 254, 264 (1986); *Rose v. Mitchell, supra,* 443 U.S. at 551; *Cassell v. Texas,* 339 U.S. 282 (1950).

THIRD

The Court of Appeals, on page A-21 of the Appendix says that George Blair waived his right to contest the reception of "bought" testimony on his trial, because he did not raise the issue prior to trial. It escapes this writer how anyone could raise the issue relative to the purchasing of any testimony prior to the time it was offered, on the trial, when the witnesses called by the Government would become known. So this holding seems to be nothing more than evidence of the determination of the Court of Appeals, in this case, to make short shrift of basic and fundamental constitutional rights.

Furthermore, five of the Singleton Judges ruled that the "whoever" of the Statute applied to prosecutors and others as well. Note the following language from the concurring opinion of Justices Lucero and Henry:

> I concur in the judgment that the United States and its agent, an Assistant United States Attorney, did not violate 18 U.S.C. §§ 201(c)(2) by offering in a plea agreement to exchange leniency for the testimony of Singleton's co-conspirator. See I. R. doc. 109, at 1-4. But ***I write separately to state my disagreement with the majority's holding that the word "whoever" in 18 U.S.C. §§ 201(c)(2), as it is used to define the class of persons who can violate the statute, cannot include the government or its agents.*** The majority's interpretation would permit the conclusion that consistent with the provisions of § 201, a United States Attorney may pay a prosecution witness for false testimony. [Footnotes Omitted]

And Justices Kelly, Seymour, and Ebel, in their dissenting opinion said that much and more. Thus, there is hardly any judicial consensus about whether a police officer is to be included within the "whoever" of the Statute, and for that reason alone the Petition for Certiorari in this case should be granted.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari, should be granted.

Respectfully submitted

MILTON R. HENRY
Attorney for the Petitioners,
George and Connie Blair

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
v.	)	
GEORGE BLAIR (98-2051); and CONNIE BLAIR, also known as LAUNA MAIKOWSKI (99-1626), *Defendants-Appellants.*	)	Nos. 98-2051; 99-1626

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 97-81440 – Patrick J. Duggan, District Judge.

Argued: February 1, 2000

Decided and Filed: May 26, 2000

Before: COLE and CLAY, Circuit Judges; BELL, District Judge.*

COUNSEL

ARGUED: Milton R. Henry, Bloomfield Hills, Michigan, for Appellants. Patricia G. Gaedeke, UNITED STATES ATTORNEY, Detroit, Michigan, for Appellee. **ON BRIEF:**

---

* The Honorable Robert Holmes Bell, United States District Judge for the Western District of Michigan, sitting by designation.

Milton R. Henry, Bloomfield Hills, Michigan, for Appellants. Patricia G. Gaedeke, UNITED STATES ATTORNEY, Detroit, Michigan, for Appellee.

COLE, J., delivered the opinion of the court, in which BELL, D. J., joined. CLAY, J. (pp. 19-28), delivered a separate opinion concurring in part and dissenting in part.

OPINION

R. GUY COLE, JR., Circuit Judge. George and Connie Blair were convicted of various drug and money laundering charges and sentenced to lengthy terms of imprisonment. The Blairs now appeal their convictions; George also appeals his sentence. Specifically, George argues that the district court erred: by denying his motion to suppress evidence; by denying his motion to dismiss the original indictment based on the composition of the grand jury; by denying his motion to vacate his sentence based on "promises" made to testifying witnesses; and by failing to reduce his sentence based on the 100:1 sentencing disparity of crack cocaine versus powder cocaine. Connie joins George's argument with respect to the district court's denial of their motion to suppress evidence and, in addition, contends that the district court erred by denying her motion to dismiss the superseding indictment based on the composition of the grand jury that returned the original indictment. For the reasons that follow, we **AFFIRM** the Blairs' convictions and George's sentence.

I.

Beginning in approximately 1992, George Blair and Connie Blair (aka Launa Miakowski) operated several prostitution houses in Detroit, Michigan. As a part of their operation, the Blairs sold drugs – typically crack cocaine or heroin – to the prostitutes who worked in the houses, most of whom had serious drug addictions. In addition to requiring the prostitutes to buy their drugs from them, the Blairs sold drugs to the prostitutes' clients. The Blairs also sold drug paraphernalia such as syringes and pipes at their houses. During a routine "shift" at a house, the Blairs sold approximately $1000 worth of drugs.

In April 1997, IRS Special Agent Thomas Kraft, having information that the Blairs were engaged in narcotics trafficking, provided an affidavit in order to obtain a search warrant for the Blairs' residence and one of the prostitution houses. A federal magistrate judge issued the warrant, which authorized law enforcement agents to seize records "relating to the transportation, importation, ordering, sale, and distribution of controlled substances." Detroit police officers assisted in the execution of the warrant to search the Blairs' residence. In that capacity, a Detroit police officer who was also a DEA Task Force Agent, Sergeant James Raby, aided in the search. Raby observed on top of a dresser an open pill vial that contained a plastic bag in which there was "a white substance [that appeared] to be narcotics." Raby conducted a field test on the substance which revealed the presence of cocaine.

At this point, Raby left the Blairs' residence to obtain a state search warrant authorizing agents to seize "[a]ll suspected controlled substances, all items used in the [sic] connection with the sales, manufacture, use, storage, distribution, transportation, delivery or concealment of controlled substances." Raby then returned to the Blairs' residence with the state warrant. Law enforcement agents ultimately seized 350 grams of crack cocaine, 50 grams of heroin, drug paraphernalia, four loaded firearms and approximately $13,000 in cash.

In December 1997, a federal grand jury in the Eastern District of Michigan indicted the Blairs in a six-count indictment, setting forth five counts of possession with intent to distribute controlled substances, in violation of 21 U.S.C. § 841(a)(1), and one count of engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. § 848. Both George and Connie were represented by the same attorney, Milton Henry,[1] who filed a motion to suppress the evidence seized during the search of the Blairs' residence. Following a hearing, the district court denied the motion.

The case was set for trial. The day before trial was scheduled to begin, Henry indicated that because of

---

[1] The government asked the court to instruct the Blairs on the dangers of joint representation. The court did so, at which time the Blairs stated their desire to be represented by the same attorney.

potential conflicts, he wished to withdraw from the representation of Connie.[2] The court severed Connie, but proceeded to trial in George's case. George waived his right to a jury trial; thus, the court conducted a bench trial. The court found George guilty of the five drug counts, but acquitted him of the CCE count.

Two weeks after George's trial and prior to Connie's trial, this court issued a decision invalidating a portion of the jury selection plan in the Eastern District of Michigan. *See United States v. Ovalle*, 136 F.3d 1092 (6th Cir. 1998). Citing *Ovalle*, the Blairs filed a motion to dismiss their indictment. On April 24, 1998, the district court denied the motion as to George, but granted it as to Connie after the government agreed that her indictment should be dismissed without prejudice because she had not yet been tried. Approximately two weeks later, another grand jury returned a superseding indictment against Connie, charging her with the same six counts set forth in the original indictment and adding a count of money laundering conspiracy, in violation of 18 U.S.C. § 1956. The Blairs then filed another motion to dismiss both indictments, which the district court denied.

In July 1998, the Blairs filed a motion for dismissal or other relief, arguing that the government induced prosecution witnesses to testify, in violation of 18 U.S.C. § 201(c). The district court denied the motion.

In August 1998, the district court sentenced George. George raised several objections at that time, including

---

[2] Connie never did obtain new counsel, and Henry continued to represent Connie, as well as George.

an objection to the calculation of his sentence on the basis of crack cocaine rather than powder cocaine. The district court sentenced George to 262 months' imprisonment to be followed by five years of supervised release. George filed a timely notice of appeal of his conviction and sentence.

In October 1998, Connie entered into a conditional plea agreement with the government pursuant to Fed. R. Crim. P. 11(a)(2). Connie entered a plea of guilty to one count of possession with intent to distribute controlled substances and to the money laundering conspiracy count, in exchange for the dismissal of the other five charges. In addition, Connie reserved her right to appeal the denial of the joint motion to suppress evidence and her motion to dismiss the superseding indictment. The district court sentenced Connie to 168 months' imprisonment to be followed by five years of supervised release. Connie filed a timely notice of appeal of her conviction.

This court consolidated the Blairs' appeals and granted Connie's motions to consolidate and adopt George's joint appendix and his argument regarding the denial of the Blairs' motion to suppress evidence.

II.

A. MOTION TO SUPPRESS

The Blairs argue that the district court erred by denying their motion to suppress evidence because Agent Kraft's affidavit was insufficient to support the federal search warrant, the federal search warrant did not comply with the particularity requirement of the Fourth

Amendment, the federal search warrant was a "subterfuge" to search for drugs, and Sergeant Raby impermissibly field tested the suspected drugs. The Blairs further argue that the state search warrant was invalid because it was obtained on the basis of Raby's unlawful actions.

We review a district court's factual findings regarding a motion to suppress for clear error, and its legal conclusions de novo. *See United States v. Leake*, 998 F.2d 1359, 1366 (6th Cir. 1993). In addition, a magistrate's finding of probable cause for the issuance of a warrant is accorded "great deference." *See id.* at 1362-63; *United States v. Sonagere*, 30 F.3d 51, 53 (6th Cir. 1994). On appeal, we must determine whether, in light of the totality of the circumstances, the magistrate had a "substantial basis" for concluding that "a search would uncover evidence of wrongdoing." *Sonagere*, 30 F.3d at 53 (quoting *Illinois v. Gates*, 462 U.S. 213, 236 (1983)).

1. The Federal Warrant

a. Sufficiency of the affidavit

The Blairs argue that the affidavit was insufficient to support the warrant in this case, because the magistrate judge had no basis to conclude that records relating to the Blairs' businesses would be found in their residence. We disagree.

The application for the federal search warrant was based on an eleven-page affidavit by Agent Kraft, who had extensive experience in drug-trafficking investigations. Kraft testified that the purpose of the search warrant was "to locate and seize evidence relating to an

investigation into violations of Title 18, United States Code Section 1956, Laundering of Monetary Instruments, Title 18, United States Code Section 1957, Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity and Title 21, United States Code Section 841 and 846." Kraft's affidavit set forth his experience in investigating the financial aspects of drug trafficking and stated that in his experience it was common for drugs traffickers to store financial records in their homes. Kraft also provided information obtained about the Blairs from several cooperating witnesses, with statements attesting to their reliability. The cooperating witnesses stated that they had worked as prostitutes for the Blairs and purchased quantities of drugs from them. The affidavit also provided that electric company records for the suspected houses of prostitution listed the subscriber for electric services as Launa Miakowski. Finally, the affidavit reported that although the Blairs owned a new home, a motor home, a barber shop, and a party store, George had not filed income tax returns for the years 1990 through 1995, and Connie had filed returns under the name Launa Miakowski indicating a total income of $46,462 for the years 1990 through 1994.

Considering the totality of the circumstances, we find that Kraft's affidavit established probable cause for the issuance of the search warrant. Accordingly, the magistrate judge had a substantial basis to conclude that wrongdoing would be uncovered by the search. The affidavit provided information regarding Kraft's extensive experience in investigating the financial aspects of drug trafficking and his professional opinion that drug traffickers keep financial records at their homes. In addition,

the affidavit provided information obtained from reliable cooperating witnesses and electric company records. This information was sufficient for the issuance of the search warrant in this case. *See United States v. Jones*, 159 F.3d 969, 975 (6th Cir. 1998) (stating that "[i]n the case of drug dealers, evidence is likely to be found where the dealers live").

b. Particularity

The Blairs also argue that the federal search warrant was overbroad in that it lacked particularity as to the items to be seized. Because the Blairs failed to make this argument to the district court, it is waived. *See United States v. Critton*, 43 F.3d 1089, 1094 (6th Cir. 1995) (holding that a defendant who fails to raise a specific issue as the basis for suppression in a motion to suppress to the district court has waived the right to raise that issue on appeal). Even if the Blairs' argument were properly before us, that argument would fail.

It is well settled that items to be seized pursuant to a search warrant must be described with particularity to prevent "the seizure of one thing under a warrant describing another." *Marron v. United States*, 275 U.S. 192, 196 (1927); *see also Andresen v. Maryland*, 427 U.S. 463, 480 (1976). However, we have recognized that the degree of specificity in a warrant must be flexible, depending upon the type of items to be seized and the crime involved. *See United States v. Ables*, 167 F.3d 1021, 1033 (6th Cir.) (citing *United States v. Henson*, 848 F.2d 1374, 1383 (6th Cir. 1988) (citation omitted)), *cert. denied*, 119 S. Ct. 2378 (1999). "Thus[,] a description is valid if it is as specific as the

circumstances and the nature of the activity under investigation permit." *Id.* We also have agreed with the Second Circuit's conclusion that " '[o]nce a category of seizable papers had been adequately described, with the description delineated in part by an illustrative list of seizable items, the Fourth Amendment is not violated because the officers executing the warrant must exercise some minimal judgment as to whether a particular document falls within the described category.' " *Id.* at 1034 (quoting *United States v. Riley*, 906 F.2d 841, 845 (2d Cir. 1990)).

Here, the warrant described the items to be seized as "[b]ooks, records, receipts, notes, ledgers, airline tickets, money orders, passports, and other papers relating to the transportation, importation, ordering, sale, and distribution of controlled substances." The warrant also authorized seizure of records of financial transactions and "electronic equipment to aid them in their drug trafficking activities." Thus, the warrant specified that the records sought were those related to drug-trafficking activities and did not violate the particularity requirement of the Fourth Amendment.

c. Subterfuge

The Blairs also argue that the federal warrant authorizing seizure of records and documents was merely a subterfuge; that, in actuality, law enforcement agents were impermissibly searching for drugs. As further support for their contention, the Blairs assert that law enforcement agents seized jewelry, money and vehicles that were obviously not records or documents, and that the federal warrant was executed primarily by police

officers who worked in narcotics. The Blairs' argument lacks merit.

The federal warrant was issued on the basis of an affidavit provided by an IRS agent who specialized in the monetary transactions that occurred as a result of drug trafficking. Although drug-trafficking activities were suspected, the IRS agent was seeking financial records indicating money laundering or monetary proceeds from illegal activities. Thus, the federal "document" warrant was properly issued and executed by federal agents, with the assistance of Detroit police officers. The investigation did not turn into a drug investigation until law enforcement officers observed the presence of drugs in plain view while executing the federal warrant. The subsequent state warrant then authorized officers to seize items related to narcotics transactions or the proceeds of narcotics transactions, which would include vehicles, jewelry and money. Accordingly, there is no evidence that the document warrant was a pretext to enable law enforcement agents to search for drugs, that the agents "manipulated" the system, or that the agents seized items not authorized by the warrants.

d. The plain view doctrine

The Blairs contend that Sergeant Raby violated their Fourth Amendment rights with respect to the drugs found during the search pursuant to the federal warrant, because the drugs were not in plain view and Raby had no authority to field test the substance. The Blairs essentially assert that Raby's actions went beyond the scope of

the federal warrant. The district court concluded otherwise, finding that the drugs were in fact in plain view and Raby therefore had authority to perform a field test. We agree with the district court.

It is well established that law enforcement agents may seize items in plain view, so long as the agent is lawfully present, the discovery is inadvertent, and the incriminating nature of the item is "immediately apparent." *United States v. Blakeney*, 942 F.2d 1001, 1028 (6th Cir. 1991); *see generally Horton v. California*, 496 U.S. 128 (1990). When officers executing a search warrant seize an item in plain view that is outside the scope of the warrant, the officers must have probable cause to believe that there is a nexus between the viewed item and criminal activity. *See United States v. Calloway*, 116 F.3d 1129, 1133 (6th Cir. 1997); *United States v. Beal*, 810 F.2d 574, 576 (6th Cir. 1987).

Here, the district court relied on Raby's statement in his affidavit in support of the state search warrant to determine that the drugs were in plain view. Raby testified that while searching the master bedroom on the federal warrant, he:

> observed in a[sic] open pill vial, a clear plastic bag containing a hard off white substance that the affiant believed to be cocaine. The affiant conducted a field test on the substance which tested positive for the presence of cocaine. Further, the affiant observed numerous bundles several inches each containing one hundred dollar, fifty and twenty dollar bills. Further, the affiant observed boxes of syringes lying on the bed in the master bedroom.

In light of this statement, we do not believe that the district court clearly erred in its factual finding that the drugs were in plain view, because Raby was lawfully present, the discovery of the drugs was inadvertent, and the incriminating nature of the drugs was immediately apparent. We further conclude that Raby had probable cause to believe there was a nexus between the suspected drugs and criminal activity.

In addition, we find no problem with the fact that Raby field tested the suspected cocaine. Because the drugs legitimately fell into the plain view exception, their warrantless seizure was permissible. *See Blakeney*, 942 F.2d at 1028. Thus, it would have been permissible for Raby to seize the suspected drugs for later testing. Accordingly, Raby did not violate the Blairs' Fourth Amendment rights by field testing the suspected drugs.[3]

2. The State Warrant

The Blairs allege that the state warrant was invalid, because it was issued on the basis of Raby's impermissible discovery of the cocaine. We can easily dispose of that argument, having found that the discovery of the cocaine was constitutionally sound. Moreover, there was no problem with Raby's affidavit in support of the state warrant.

---

[3] The fact that Raby field tested the drugs does not indicate that he lacked probable cause to believe that the substance was in fact cocaine. *See United States v. Buchanan*, 70 F.3d 818, 826 & n.5 (5th Cir. 1995) (*as amended in* 1996) (stating that "the fact that officers chose to field test the substance does not indicate that they lacked probable cause to believe the residue was contraband").

Raby's affidavit clearly stated his qualifications and what he observed in plain view during the execution of the federal warrant. Accordingly, the Blairs' argument regarding the legitimacy of the state warrant fails.

B. *OVALLE* ISSUE

In *Ovalle*, this court held that the jury selection plan in the Eastern District of Michigan – which was essentially the same plan in place at the time of the original indictment in this case[4] – violated the Jury Selection and Service Act, 28 U.S.C. § 1862, and the Equal Protection Clause, because it allowed the removal of every fifth non-black juror from the jury wheel in order to increase the number of black jurors. *See Ovalle*, 136 F.3d at 1099-1100, 1105-07. The Blairs contend that the district court erred by denying their motions to dismiss their indictments – in the case of Connie, the superseding indictment – based on the composition of the grand jury that returned the original indictment pursuant to *Ovalle*. We review a defendant's challenge to the composition of a grand jury de novo. *See Ovalle*, 136 F.3d at 1100.

---

[4] The district court stated that, in actuality, a slightly different jury selection plan was in effect at the time of the Blairs' original indictment that allowed juror's names who had been removed to be deferred for use in future jury wheels rather than being eliminated. *See United States v. Blair*, 9 F. Supp. 2d 779, 780 n.1 (E.D. Mich. 1998).

1. George's Argument

In George's case, the district court denied his motion to dismiss the indictment on the basis of *Ovalle*, holding that George waived his right to challenge the composition of the grand jury by failing to make a pretrial motion under Fed. R. Crim. P. 12(b)(2),[5] and by failing to establish cause or prejudice for this procedural default. *See Blair*, 9 F. Supp. 2d at 780-81. We agree.

George contends that the district court should have found that cause existed to excuse his failure to raise the *Ovalle* issue prior to trial, because *Ovalle* was not decided until February 23, 1998, two weeks after his trial. Pursuant to *Ovalle*, it is clear that a defendant's failure to

---

[5] Fed. R. Crim. P. 12(b)(2) provides:

> (b) **Pretrial Motions**. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion . . . *The following must be raised prior to trial*: . . .
>
> (2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings). . . .

Fed. R. Crim. P. 12(b) (emphasis added). The effects of failing to raise a 12(b)(2) motion before trial are set forth in Rule 12(f):

> (f) **Effect of Failure To Raise Defenses or Objections.** Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court . . . shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

Fed. R. Crim. P. 12(f).

object to the composition of the grand jury prior to trial constitutes waiver of that argument. *See* 136 F.3d at 1107-09; Fed R. Crim. P. 12(b)(2). In order to show cause to excuse this type of procedural default, a defendant must demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the . . . procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). "[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for the procedural default." *Id.* at 486. George's reliance on the timing of *Ovalle* is therefore misplaced. *Ovalle* did not recognize a new right; instead, it held that the 1992 jury selection plan violated well established constitutional rights. Prior to trial, George failed to recognize or chose to ignore a potential challenge to the jury selection plan. This failure does not establish cause to overcome George's waiver of the issue; the fact that *Ovalle* illuminated this issue two weeks later does nothing to change that result. George has failed to demonstrate an objective external factor that prohibited him from raising an objection to the jury selection plan prior to his trial; accordingly, he has not shown cause to excuse his waiver of this issue. *See United States v. Simpson*, Nos. 97-2305, 97-2307, 97-2316, 98-1050, 1999 WL 777348, at *10 (6th Cir. Sept. 21, 1999) (stating that "the fact that Ovalle was not decided until after [defendant's] trial is not sufficient cause for this court to grant relief from the waiver of the issue"); *see also United States v. Bischoff*, Nos. 97-1980, 97-1983, 1999 WL 644340, at *6 (6th Cir. Aug. 19, 1999) (cause not shown for failure to raise *Ovalle* in district court); *United States v. Valme*, No. 98-1340, 1999 WL 519232, at *5 (6th

Cir. July 16, 1999) (holding that cause did not exist for defendant's failure to timely raise *Ovalle* issue); *United States v. Garavaglia*, Nos. 98-1512, 98-1674, 1999 WL 220125, at *6 (6th Cir. April 6, 1999) (stating that defendant's contention that "case law was against him" did not constitute cause to excuse waiver of *Ovalle* issue); *United States v. Carr*, Nos. 97-1367, 97-1422, 97-1513, 97-1584, 97-1814, 1999 WL 211928, at *6 (6th Cir. March 11, 1999) (cause not shown for failure to raise *Ovalle* issue prior to trial).

In addition, George argues that the district court should have construed his co-defendant's timely objection to the composition of the grand jury to include him. In so arguing, George relies on the fact that, in *Ovalle*, we allowed a "narrow exception" to the Ovalles with respect to waiver pursuant to Fed. R. Crim. P. 12(b)(2) because their co-defendants raised a timely exception before their joint trial. We stated, however, that:

> We emphasize that it is only because the Ovalles' codefendants Canales and Garcia raised a timely objection to the seating of the grand and petit juries that the Ovalles are permitted the benefit of this decision. Had Canales and Garcia not raised these objections prior to trial, all of the appellants would be barred from raising such an objection for the first time on appeal or in a collateral proceeding attacking their convictions since the objection would be waived by the failure to object prior to trial. *See* Fed. R. Crim. P. 12(b)(2).

Ovalle, 136 F.3d at 1109.

We agree with the district court and the government that Connie's timely objection, i.e., prior to *her* trial, does not create an exception for George. Unlike the situation in *Ovalle*, Connie did not raise her valid objection prior to *George's* trial, but after George had been convicted. This does not fall into the narrow exception to Rule 12(b)(2) created by *Ovalle*. Accordingly, the district court did not err by denying George's motion to dismiss his indictment on the basis of the composition of the grand jury.

2. Connie's Argument

As for Connie, the district court dismissed the original indictment with respect to her without prejudice and, two weeks later, a new grand jury issued a superseding indictment against her. Connie now contends that a superseding indictment can only be issued when a valid, prior indictment is still pending. Connie further argues that a superseding indictment cannot arise from an invalid, original indictment. Connie's argument's lack merit.

Connie is correct in that some courts have narrowly defined the term "superseding indictment" to refer to an indictment returned when an original indictment still exists. *See United States v. Bowen*, 946 F.2d 734, 735 (10th Cir. 1991) (citing *United States v. Rojas-Contreras*, 474 U.S. 231, 237 (1985) (Blackmun, J., concurring)). However, this court has held that a superseding indictment returned one month after the original indictment had been dismissed for citing the wrong statute was valid. *See United States v. Pi*, 174 F.3d 745, 748 (6th Cir.), *cert. denied*, 120 S. Ct. 74 (1999). Moreover, even if the term "superseding"

was inappropriate to describe the second indictment, such a description is mere surplusage that can be ignored. *See United States v. Caldwell*, 176 F.3d 898, 902 (6th Cir.) ("A part of the indictment unnecessary to and independent of the allegations of the offense proved may normally be treated as a 'useless averment' that 'may be ignored.' " (citation and quotation omitted)), *cert. denied*, 120 S. Ct. 275 (1999).

We further note that Connie does not have a double jeopardy argument arising from the second indictment. It is well established that dismissal of an indictment prior to trial does not raise a double jeopardy issue and does not bar subsequent prosecution for the offenses described in the indictment. *See Pi*, 174 F.3d at 748. Connie argues, however, that jeopardy attached in her case because George had already been tried at the time the indictment against her had been dismissed. Connie's argument is misplaced, as she cannot assert George's jeopardy rights. Connie's trial had been severed from George's and had not yet begun when the original indictment was dismissed and the superseding indictment filed. Accordingly, jeopardy did not attach to the charges against Connie.

Finally, Connie asserts that the illegality of the original indictment somehow tainted the second indictment. Again, Connie misses the mark. Any irregularity in an original indictment has no effect on a subsequent indictment. *See id.* (citing *United States v. Senak*, 477 F.2d 304, 306 (7th Cir. 1973) ("[a] federal grand jury may return a second indictment for the same offense when the first indictment has been dismissed or otherwise found defective")).

C. 18 U.S.C. § 201(c)[6]

George argues that his conviction should be vacated on the basis that law enforcement agents impermissibly promised witnesses leniency and paid their expenses in exchange for their testimony against him. George filed such a motion in the district court approximately five months after his trial, based on the Tenth Circuit's panel decision in *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998) (holding that promises made in a plea agreement could violate 18 U.S.C. § 201(c)), *vacated*, 165 F.3d 1297 (10th Cir.) (en banc), *cert. denied*, 527 U.S. 1024, 119 S. Ct. 2371 (1999). On appeal, George concedes that the panel decision in *Singleton* has been overruled and acknowledges this court's decision in *United States v. Ware*, 161 F.3d 414, 419 (6th Cir. 1998) (holding that § 201(c), which penalizes an individual for giving anything of value in exchange for testimony, does not apply to the United States government), *cert. denied*, 526 U.S. 1045 (1999). Nonetheless, George contends that § 201(c) was violated because it was not the prosecutor who gave things of value to witnesses, it was Sergeant Raby. This argument fails.

---

[6] Title 18 U.S.C. § 201(c) provides in part that:

(c) Whoever –

(1) otherwise than as provided by law for the proper discharge of official duty – . . .

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witnesses [sic] upon a trial,. . . .

First, as the government notes, George has waived this argument by failing to raise it before the trial court. In addition, even if George had not waived this argument, any "promises" made to witnesses by Sergeant Raby were made on behalf of the government; accordingly, George's argument lacks merit.

D. CRACK COCAINE/POWDER COCAINE

George asserts that the government failed to establish at sentencing that the involved cocaine was crack cocaine. We review factual determinations of the sentencing court for clear error. *See United States v. Gort-Didonato,* 109 F.3d 318, 323 (6th Cir. 1997).

The district court, after extensive arguments, determined that George should be sentenced on the basis of crack cocaine. The court noted:

> The other evidence that leads this Court to find by a preponderance of the evidence that the substance involved is crack cocaine is not only do I believe that the substance as identified by the lab report is, in fact, crack cocaine, the witnesses testified with a large amount of consistency. The police officers, who made the search, identified it as, quote, crack cocaine. . . . But as significant is the fact that the witnesses, the prostitutes[,] testified with a degree of regularity that the substance that they were buying from the house in which they were living was, in fact, crack cocaine. They referred to it as rocks that they were purchasing.

The district court's statements provided ample reasoning for sentencing George on the basis of crack cocaine. The district court did not commit clear error.

Finally, George raises a constitutional challenge to the 100:1 sentencing disparity of crack cocaine versus powder cocaine. The law is well settled in this circuit that the 100:1 ratio withstands constitutional scrutiny. *See, e.g., United States v. Bingham*, 81 F.3d 617, 630-31 (6th Cir. 1996); *United States v. Hill*, 79 F.3d 1477, 1488-89 (6th Cir. 1996); *United States v. Reece*, 994 F.2d 277, 278-79 (6th Cir. 1993); *United States v. Tinker*, 985 F.2d 241, 242 (6th Cir. 1992); *United States v. Williams*, 962 F.2d 1218, 1227 (6th Cir. 1992); *United States v. Pickett*, 941 F.2d 411, 418-19 (6th Cir. 1991).

III.

For the foregoing reasons, we affirm.

CONCURRING IN PART, DISSENTING IN PART

CLAY, Circuit Judge, concurring in part and dissenting in part. I concur in Judge Cole's well-reasoned and thorough opinion as it relates to all issues except George Blair's challenge to the district court's denial of his motion to dismiss the original indictment based upon the composition of the grand jury. Mr. Blair's challenge to the composition of the grand jury should not be held as

untimely because to do so puts form over substance inasmuch as his attorney had no reason to believe that the jury selection plan in the Eastern District of Michigan at that time would be found unconstitutional. However, granting Mr. Blair relief and allowing the government to reindict him at this time would do nothing more than put form over substance once again, since the *current* jury selection plan in the Eastern District of Michigan has been found to be unfair to at least one minority group – African Américans. Which is to say, although this Court held that the jury selection plan under which Mr. Blair's original indictment was delivered was unconstitutional, *see United States v. Ovalle*, 136 F.3d 1092, 1108-09 (6th Cir. 1998), after *Ovalle* was issued, the Eastern District of Michigan simply returned to the jury selection plan status quo *ante*, thereby reinstituting the defective jury selection plan which had previously been found to be unfair to African Americans. As such, the discriminatory jury selection plan currently in place in the Eastern District of Michigan is no more constitutionally fair than the plan under which Mr. Blair first proceeded.

Because the current jury selection plan in the Eastern District of Michigan has been shown to be demonstrably unfair to African Americans, affording Mr. Blair a new trial at this juncture would appear to be an exercise in futility. Mr. Blair would merely be exchanging one unconstitutional jury selection plan for another in the course of a remand from this Court. It is for this reason that although I would reverse, thereby allowing the government to reindict Mr. Blair, the judges of the Eastern District of Michigan should immediately revise their jury

selection plan to comport with all constitutional mandates, so that Mr. Blair would be guaranteed the constitutionally fair trial to which he is entitled. *See United States v. Spearman*, 186 F.3d 743, 747-55 (6th Cir. 1999). Allowing defendants to be tried and convicted under a knowingly unfair jury selection system in the Eastern District of Michigan is unconscionable; allowing Mr. Blair to be twice subjected to an unfair jury selection system would be even worse.

A. Timeliness of Mr. Blair's Motion to Dismiss the Indictment on the Basis of *Ovalle*

It has been recognized that "the plain language of Rule 12(b) clearly does not require that constitutional challenges to the jury selection process must be made prior to trial." *See United States v. Greene*, 971 F. Supp. 1117, 1137 (E.D. Mich. 1997). Indeed, an examination of the plain language of the rule indicates that it is silent as to constitutional challenges. Specifically, the language of the rule provides as follows:

> **(b) Pretrial Motions.** Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:
>
> **(1)** Defenses and objections based on defects in the institution of the prosecution; or
>
> **(2)** Defenses and objections based on defects in the indictment or information (other than that it fails to show

> jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or
>
> **(3)** Motions to suppress evidence; or
>
> **(4)** Requests for discovery under Rule 16; or
>
> **(5)** Requests for a severance of charges or defendants under Rule 14.

Fed. R. Crim. P. 12(b)(1)-(5). The Advisory Committee Notes on the 1944 adoption of subdivision (b)(1) and (2) states that the section includes challenges made to the "[i]llegal selection or organization of the grand jury, disqualification of individual grand jurors, presence of unauthorized persons in the grand jury proceedings, defects in indictment or information other than lack of jurisdiction or failure to state an offense, etc." *See* Fed. R. Crim. P. 12(b) advisory committee's note. However, I submit that although the advisory note speaks to illegal selection or organization of the grand jury, it does not speak to the specific nature of an unconstitutional selection of the grand jury, where the defendant is not challenging the selection of *his* particular grand jury based upon an illegality such as juror tampering, but rather the defendant is challenging the unconstitutional nature of the jury selection plan as a whole. *See Greene*, 971 F. Supp. at 1138 (distinguishing *Shotwell Manufacturing v. United States*, 371 U.S. 341 (1963) on the basis of, among other things, the fact that the defendant did not challenge the entire jury selection system, but only the impanelment of his own jury). Accordingly, I believe that Rule 12(b)(2) is

not an absolute bar to considering Mr. Blair's challenge to the jury selection plan.

To the extent that one disagrees, I believe that under Rule 12(f), Mr. Blair has shown cause to excuse his failure to raise the challenge to the jury selection plan prior to trial. In concluding otherwise, the majority accurately states that a defense counsel's failure to recognize the factual or legal basis for a claim, or a defense counsel's failure to raise the claim despite recognizing it, does not constitute cause to excuse the lack of a timely objection. However, I respectfully disagree with the majority's conclusion that Attorney Milton R. Henry did not have justifiable cause to excuse his failure to recognize or raise a challenge to the jury selection process. At the time of Mr. Blair's indictment, the jury selection plan in place had been drafted and approved by the judges of the Eastern District of Michigan and approved by the Judicial Counsel of the Sixth Circuit allegedly to remedy the underrepresentation of African Americans. Therefore, Attorney Henry had no reason to believe that the very judges who approved the plan would find it unfair to African Americans. *See Spearman*, 186 F.3d at 754 (finding that "a defense attorney would have had no reason to challenge the jury selection process that was in place in the Eastern District of Michigan prior to *Ovalle*, inasmuch as the court to which he would make his challenge consisted of the very judges who approved the plan"). Those unpublished cases cited and relied upon by the majority fail to recognize that an attorney similarly situated to Mr. Henry would have found any challenge to the jury selection plan futile in light of the fact that the plan had allegedly

been designed and approved to correct the underrepresentation of African Americans. In other words, even if an attorney similarly situated to Mr. Henry had held a belief that the plan was unfair to blacks, or had heard of other attorneys who believed the same, there was no basis for the attorney to believe that his challenge to the jury selection plan would be seriously considered – let alone be successful. Indeed, none of the judges of the Eastern District of Michigan have acted upon the concerns expressed more than one year ago regarding the unfair jury selection process as it exists in the aftermath of *Ovalle*. *See Spearman*, 186 F.3d at 747-55.

Furthermore, what is of critical importance here is the fact that the defendants in *Ovalle* who challenged the jury selection process under the Fifth Amendment right to equal protection as well as under the Sixth Amendment right to fair representation, were *Hispanic*, not African American. In other words, the defendants in *Ovalle* made these challenges on the basis of their *Hispanic* ethnicity; however, an African-American defendant such as Mr. Blair would have had no reason to challenge the jury selection process which allegedly had been designed – and subsequently approved – to correct the constitutionally infirm jury selection process as applied to African Americans. Therefore, while Hispanics may have had a reason to question the jury selection process in the Eastern District of Michigan, African Americans would not have had such a reason. In my opinion, this serves as an objective external factor that excused Attorney Henry from raising the issue.

Finally, I agree with Mr. Blair's argument that the district court should have construed his co-defendant's

objection to the composition of the grand jury to include him. Once again, to hold otherwise does nothing more than elevate form over substance, where Mr. Blair is not allowed to avail himself of his co-defendant's challenge simply because he and his co-defendant had separate trials.[1] If Mr. Blair had been tried with his co-defendant then, like the Ovalles, Mr. Blair would have been able to benefit from his co-defendant's objection. *See Ovalle,* 136 F.3d at 1109. Under the majority's view, had the Ovalles moved for a separate trial from their co-defendants Canales and Garcia, then they would not have been able to avail themselves of their co-defendants' objection to the jury venire.

The facts of this case are ones not anticipated by the *Ovalle* court. It is true that in *Ovalle* the Court stated that "[h]ad Canales and Garcia not raised these objections prior to trial, all of the appellants would be barred from raising such an objection for the first time on appeal or in a collateral proceeding attacking their convictions since the objection would be waived by the failure to object prior to trial." *See* 136 F.3d at 1109. However, the fact remains that the Ovalles did not raise such an objection

---

[1] It is significant that Mr. Blair and his co-defendant Connie Blair had proceeded in tandem throughout the criminal process, such that the pretrial conference, motions to quash the search warrant, suppress the evidence, and dismiss the case, were jointly brought by these Defendants. It was only after Mr. Blair waived his right to jury trial that the district court severed Mr. Blair's case from his co-defendant's case. *See* United States District Court for the Eastern District of Michigan (Detroit) Criminal Docket for Case # : 97-CR-18440-1, at 3-6, *United States v. Blair.*

prior to trial and the Court allowed these defendants to avail themselves of their co-defendants' challenge. This case should be no different. As cited at length by the majority, *Ovalle* has been interpreted as precluding defendants who did not raise challenges to the jury selection plan prior to trial from availing themselves of the *Ovalle* decision. However, these cases did not involve a situation like that in the case at hand, where one co-defendant was able to avail herself of the *Ovalle* decision, but the other co-defendant was not able to avail himself of the same. This case is more factually analogous to that of the Ovalles than that of the cases where a single defendant or co-defendants each raised a challenge under *Ovalle after* the trial had begun or was concluded. Therefore, like the Ovalles, Mr. Blair should be allowed to avail himself of his co-defendant's objection.

However, as noted at the outset of my opinion and as further explained in the section that follows, reindicting Mr. Blair under the jury selection process as it now stands in the Eastern District of Michigan would do nothing but subject him to a jury selection process that is no more representative, and therefore no more constitutional, than that used in connection with his first indictment. In fact, as a result of the *Ovalle* decision, the jury venire under which Mr. Blair would proceed at this point may actually be *less* fair to African Americans than the jury venire under which Mr. Blair first proceeded. This is because the jury selection plan in operation at the time Mr. Blair's indictment was handed down was designed to rectify the underrepresentation of African Americans in the previous plan; however, it is that very "previous plan" – the plan known to be unfair to African Americans – which is

operation at the current time as a result of the *Ovalle* decision.

B. The Jury Selection Process in the Eastern District of Michigan in the Aftermath of the *Ovalle* Decision

United States v. Spearman analyzed at length *Ovalle's* failure to consider the defendant's fair representation challenge to the jury selection process brought under the Sixth Amendment, and how the Court's failure to consider this challenge left the jury selection reform in the hands of the judges of the Eastern District of Michigan who "have failed in their responsibility to devise a jury selection plan which provides for a fair cross section of the community as applied to all races." *See* 186 F.3d at 748. Specifically, *Spearman* stated as follows:

> Indeed, at issue in *Ovalle* was whether Hispanics were unconstitutionally represented in the jury array in violation of the appellants's Sixth Amendment right to a jury drawn from a fair cross section of the community, as well as their equal protection rights under the Fifth Amendment. *Ovalle*, 136 F.3d at 1095. However, the *Ovalle* court chose not to adjudicate the issue of fair representation, and instead limited its analysis and holding to the equal protection claim as applied to the "mechanics" of Section VIII. B. *Id.* at 1095, 1106 (finding that underrepresentation of any group "was not the point" of the court's inquiry). In stopping short of properly adjudicating the constitutionality of the jury selection process in the Eastern District, the court further frustrated the problem . . . by dividing the group of potential jurors into two broad categories of blacks and "non-

blacks," . . . and in failing to consider actual representation of the individual groups, [thereby] singling out African Americans as somehow being adequately – or more than adequately – represented by the jury selection plan that was in place at the time when, historically, it had been the white population which had been more than adequately represented.

Furthermore, by failing to address whether all groups were constitutionally represented, the court also left unredressed the issue of whether the jury selection plan which was in place at the time, although designed to increase the number of African Americans in the jury array, was in fact providing for a representative number of black jurors.

In addition, the court erroneously assumed that by invalidating Section VIII. B. of the plan, it thereby remedied the constitutionally infirm jury selection process that existed in the Eastern District of Michigan. However, by failing to consider the adequate representation of citizens in the jury array in the Eastern District in the course of its analysis, the *Ovalle* court did not recognize that while it may have been invalidating a jury selection process which was constitutionally infirm as applied to "non-blacks," it was leaving in its wake a jury selection plan which was unconstitutional as applied to blacks – and possibly other minority groups as well – inasmuch as the *Ovalle* court simply invalidated Section VIII. B. of the plan. By hastily ending its analysis there, the *Ovalle* court left African Americans in the same "underrepresented" position as they were before the plan was initiated, thereby simply exchanging one apparently

> one unfair process for another, without considering the impact of its ruling on the underrepresentation of blacks in the jury selection process – a problem that had been duly recognized by the United States District Court for the Eastern District of Michigan, and without examining through statistics or empirical data whether the plan left status quo *ante* was constitutionally sound as applied to all minority groups.

Id. at 751.

Despite the criticisms and concerns regarding the jury selection plan in the Eastern District of Michigan which were brought to the fore by *Spearman* nearly one year ago, the jury selection plan utilized in this district remains status quo. These concerns are not baseless or without foundation. Because of the long-standing acknowledged underrepresentation of African Americans in the jury venire of the Eastern District of Michigan, the current jury selection process in this district is of questionable constitutionality. Although some minor modifications were made in the jury selection plan that was reinstated by the Eastern District of Michigan in response to *Ovalle*, nothing was done in the main to remedy the known problem of the underrepresentation of African Americans on federal juries. Indeed, even in the face of an express acknowledgment of the unfairness of the jury selection system as applied to African Americans by one of the judges from the Eastern District of Michigan and the district's former Chief of Court Operations, the jury selection plan remains the same. *See* Avern Cohn & David A. Sherwood, The Rise and Fall of Affirmative Action in Jury Selection, 32 U. Mich. J.L. Reform 323, 333 (1999)

("Early experiences suggest that judges are trying criminal cases largely with African-American defendants, prosecuted in front of mostly white judges, by mostly white prosecutors and defense counsel, and with decisions made by almost all-white juries. This is not fairness in the criminal justice system.").

"The Sixth Amendment requires that the jury venire from which a jury is selected represent a 'fair cross-section' of the community." *United States v. Allen*, 160 F.3d 1096, 1103 (6th Cir. 1998) (quoting *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975)). Yet, despite this precious constitutional guarantee, and despite the fact that it is well known that African-American defendants in the Eastern District of Michigan are being deprived of this guaranteed right, the judges of that district have yet to act. It is for this reason that I continue to urge that the jury selection plan in this district be reformed to insure that African Americans, and other minority groups as well, are provided with the constitutionally sound and fair jury to which they are entitled. The judges of the Eastern District of Michigan should reevaluate the current system through the use of empirical and statistical data, and devise a plan that comports with the fair representation requirement of the Sixth Amendment. Until this occurs, granting Mr. Blair's motion to dismiss the indictment (thereby subjecting him to possible reindictment by the government), although *technically* the correct form of relief in this case, would *actually* provide no relief at all.

C. Conclusion

I would reverse the district court's denial of Mr. Blair's motion to dismiss the indictment on the basis of *Ovalle*. However, if the district court had been correct in denying Mr. Blair's motion, I agree with the majority that Mr. Blair's other claims would fail, as do all claims raised by his co-defendant, Connie Blair.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 98-2051; 99-1626

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

GEORGE BLAIR (98-2051); and
CONNIE BLAIR, also known as Launa Maikowski (99-1626),

Defendants – Appellants.

Before: COLE and CLAY, Circuit Judges; BELL, District Judge.

JUDGMENT

(Filed May 26, 2000)

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgments of conviction of George and Connie Blair are AFFIRMED, and the sentence of George Blair is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

[29] A I notified the raid commander, the Detroit raid commander, which was Sergeant Sanders, or I caused her to be notified by radio and then I returned to the scene.

Q And once you returned to the scene, what did you do?

A I entered the premises and observed various items that had been confiscated. I observed money being removed from the dresser drawer, the master bedroom.

Q Let me show you Proposed Exhibit 1.

Would you open that up please and see if you can identify that?

A Sure. This is the brown pill vial depicted in the photograph that I observed on the dresser and the narcotics that was inside it. The pill vial, the plastic bag, and the narcotics.

MR. RICHARDS: Your Honor, I offered Proposed Exhibit 1 into evidence.

THE COURT: Well, on my list I've got 1 subdivided into letters.

MR. RICHARDS: Subdivided into what?

THE COURT: Letters.

MR. RICHARDS: Yes, you're right.

THE COURT: So what precisely are you offering?

MR. RICHARDS: I'm sorry. I'm going to wait until I've got the chemist's report in or the chemist

* * *

[43] plastic bag.

Q Right after you removed it?

A Yes, sir.

Q Now, this container we can say that that container that we're describing would be one and three-quarters inches by about three inches?

A If that's what it says.

Q And did it have any identifying marks on it? Any names or anything?

A No, sir.

Q Did you take it in for fingerprint analysis?

A I did not, no.

Q Has it ever been analyzed at all to find out who touched that?

A That has not, sir.

Q No. And the bag itself that you say you found something in, did you ever have that checked for fingerprints?

A No, sir.

Q So we don't know whose item this was; is that correct?

A We didn't take it in for fingerprints, no, sir.

Q I beg your pardon?

A We did not hold it for fingerprints, no.

Q You didn't hold it for fingerprints. And you had to [44] open and untie that bag; is that right?

A Yes, sir.

Q Now, the other items on top of this bureau, they don't look like drug items, do they?

A No, sir.

Q No. And this whatever it was inside of that bag wrapped up real tight, it looked like a white powder, a rocky powder of some kind; is that right?

A Yes, sir, a hard white powder.

Q And so you wanted to check it out to find out if it was heroin, and you therefore performed the field test on it?

A Yes, sir.

Q And then went to get a search warrant?

A That's correct.

Q All right. Because it was not – clearly that was not a document, was it?

A No, sir, that's not a document.

Q No. And so therefore you contacted the raid commander and the City of Detroit and your raid commander.

Didn't you say you contacted him? He told you go get a warrant?

A I had a discussion with her. She was at the scene, yes.

Q She was at the scene?

* * *